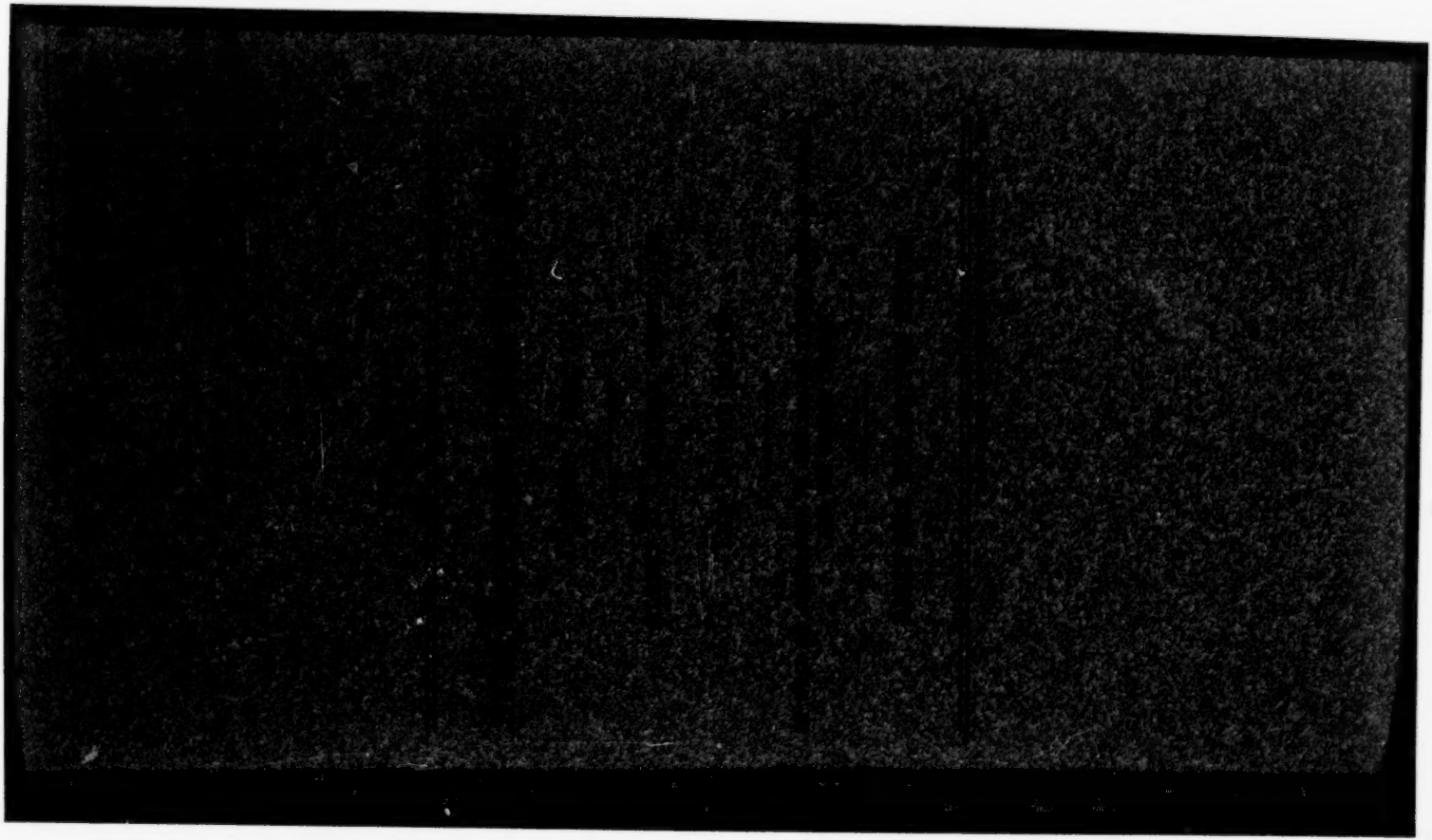

INDEX.

Page.

THE FACTS 1

THE QUESTIONS 2

FIRST POINT: Section 860, R. S., was repealed before the trial and does not apply; but neither it nor section 7A–9 of the bankruptcy act gave any privilege against the use of the fact of self-contradiction as part of the proof of perjury 2–13

I. There is considerable doubt as to whether the point is raised by the facts, but owing to the importance of the question it will be argued 3

II. The statutes and the repeal of section 860, R. S. 3

The petitioner has based his argument mainly upon section 860, which was repealed without a saving clause before his testimony was used against him, and therefore afforded no protection 4

Balt. &c., R. Co. v. *Grant*, 98 U. S. 398.
Ewell v. *Daggs*, 108 U. S. 143, 150.
Hopt v. *Utah*, 110 U. S. 574.
Kans. P. R. Co. v. *Twombly*, 100 U. S. 78, 81.
McNulty v. *Batty*, 10 How. 72.
Re Hall, 167 U. S. 38.
South Carolina v. *Gaillard*, 101 U. S. 433.
Wilkinson v. *Nebraska*, 123 U. S. 286.
Cf. *Legal Tender Cases*, 12 Wall. 457.

III. There is no such immunity 7

The immunity granted by section 7, a–9, of the bankruptcy act does not prevent the Gov-

THE QUESTIONS—Continued.

Page.

ernment from using the bankrupt's testimony to prove other points of the charge than the mere text of the false statement itself 7

Daniels v. *U. S.*, 196 Fed. 459.
Edelstein v. *U. S.*, 149 Fed. 636.
Glickstein v. *U. S.*, 222 U. S. 139.
U. S. v. *Brod*, 176 Fed. 165.
Cf. *People* v. *Cahill*, 126 App. Div. (N. Y.) 391.
U. S. v. *Smith*, 47 Fed. 501.

Nor does it prohibit the admission of testimony before the commissioner to sustain the charge before the referee, and *vice versa*, since both examinations were part of the same proceeding 13

Powers v. *U. S.*, 223 U. S. 303.

SECOND POINT: The evidence supported the verdict 14

THIRD POINT: The examination by the commissioner as special examiner was duly authorized, and the false testimony there was perjury 14–28

I. The prior decisions 15

The decision of the Court of Appeals below is supported by the undisputed rulings under the acts of 1841 and 1867 and by the uniform practice under the present act until the contrary decision rendered in 1909, by the Court of Appeals for the Third Circuit, in *Skubinsky* v. *Bodek*, 172 Fed. 332 15

Ex parte Bick, 155 Fed. 908.
Ex parte Lee, 15 Fed. Cas. 8, 178.
In re Fixen, 96 Fed. 749.
In re Fleischer, 151 Fed. 81.
In re Salkey, 21 Fed. Cas. 12, 252.
U. S. v. *Wechsler*, 16 Am. B. R. 1.
U. S. v. *Liberman*, 176 Fed. 161.

THE QUESTIONS—Continued.

Page.

See:

Dissenting opinion of Judge Buffington in *Skubinsky* v. *Bodek*, 172 Fed. 332, *supra*.

10 Columbia Law Rev. 70.

23 Harvard Law Rev. 221.

Loveland, Bankruptcy (3rd ed.), §204.

II. Even under section 21a of the bankruptcy act the examination was authorized, because the estate was in process of "administration" within the meaning of the section as soon as it came into the jurisdiction of the court by the filing of the petition, and certainly as soon as the receiver was appointed. 18

In re Fleischer, 151 Fed. 81, *supra*.

Dissenting opinion of Judge Buffinton in the *Skubinsky* case, 172 Fed. 332, *supra*.

III. Independently of section 21 (a), an examination of a bankrupt prior to adjudication is within the general equity powers of a bankruptcy court conferred by section 2 (15), and the concluding paragraph of the section 21

Blake v. *Francis-Valentine Co.*, 89 Fed. 691.

In re Cohen, 136 Fed. 999.

In re Lacov, 142 Fed. 960.

In re Levi and Klauber, 142 Fed. 962.

In re Union Trust Co., 122 Fed. 937.

White v. *Schloerb*, 178 U. S. 542.

IV. This construction, being therefore possible, both under section 21 (a) and under the general equity power, should be accepted, because the other view leads to the result that no witnesses may be examined before adjudication, thus bringing to a standstill the powers of the bankruptcy courts and their representatives during the 20-day interval between the filing of the petition and the adjudication. 25

See:

Craddock-Terry Co. v. *Kaufman*, 175 Fed. 303.

SPOT ON PAGE

THE QUESTIONS—Continued. Page.

In re Fleischer, 151 Fed. 81, *supra*.

U. S. v. *Liberman*, 176 Fed. 161, *supra*.

APPENDIX.—Report of the Senate Committee on a bill to repeal section 860, R. S. 29

AUTHORITIES CITED.

Balt. &c. R. Co. v. *Grant*, 98 U. S. 398 5
Bardes v. *Hawarden*, 178 U. S. 524 21
Berkowitz, In re, 173 Fed. 1012 23
Bick, Ex parte, 155 Fed. 908 16
Blake v. *Francis-Valentine Co.*, 89 Fed. 691 23
Brenner, Matter of, 26 Am. B. R. 646 22

Claasson v. *U. S.*, 142 U. S. 140 15
Cohen, In re, 136 Fed. 999 23
Collier Bankruptcy (9th ed.) pp. 452–453 17
Columbia Law Review, vol. 10, p. 70 17
Counselman v. *Hitchcock*, 142 U. S. 547 6
Craddock-Terry Co. v. *Kaufman*, 175 Fed. 303 27
Crenshaw, In re, 155 Fed. 271 17

Daniels v. *U. S.*, 192 Fed. 459 8
Davidson, In re, 158 Fed. 678 17

Edelstein v. *U. S.*, 149 Fed. 636 9
Evans v. *U. S.*, 153 U. S. 584 15
Ewell v. *Daggs*, 108 U. S. 143 5

Fixen, In re, 96 Fed. 749 ..... 16, 24
Fleischer, In re, 151 Fed. 81 ..... 16, 17, 19, 24, 26

Glickstein v. *U. S.*, 222 U. S. 139 ..... 2, 8
Goode v. *U. S.*, 159 U. S. 663 15

Hall, In re, 167 U. S. 38 7
Harvard Law Review, vol. 23, p. 221 17
Heike v. *U. S.*, 227 U. S. 423 12
Hopt v. *Utah*, 110 U. S. 574 5

Kane, In re, 127 Fed. 552 22
Kans. P. R. Co. v. *Twombly*, 100 U. S. 78 5

	Page.
Lacov, In re, 142 Fed. 960	22
Lee, Ex parte, 15 Fed. Cas. 8, 178	16, 22
Legal Tender Cases, 12 Wall. 457	6
Levi and Klauber, In re, 142 Fed. 962	22, 23
Lipke, In re, 98 Fed. 970	23
Loveland, Bankruptcy (3d ed.), sec. 204	17
McNulty v. *Batty*, 10 How. 72	6
People v. *Cahill*, 126 App. Div. (N. Y.) 391	8
Podolin v. *McGettigan*, 193 Fed. 1021	17
Powers v. *U. S.*, 223 U. S. 303	11, 13, 15
Remington, Bankruptcy, sec. 1543	17
Salkey, In re, 21 Fed. Cas. 12, 252	16
Skubinsky v. *Bodek*, 172 Fed. 332	16, 17, 19
South Carolina v. *Gaillard*, 101 U. S. 433	6
State v. *Broughton*, 7 Fed. 96	12
Thompson, In re, 179 Fed. 874	17
Union Trust Co., In re, 122 Fed. 937	22, 23
U. S. v. *Brod*, 176 Fed. 165	8
U. S. v. *Liberman*, 176 Fed. 161	16, 27
U. S. v. *Smith*, 47 Fed. 501	8
U. S. v. *Swift*, 186 Fed. 1002	11
U. S. v. *Wechsler*, 16 Am. B. R., 1; 158 Fed. 579	16
U. S. v. *Wood*, 14 Pet. 430	12
White v. *Schloerb*, 178 U. S. 542	23
Wilkinson v. *Nebraska*, 123 U. S. 286	5

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

ALBERT B. CAMERON, PETITIONER,
v.
THE UNITED STATES.
No. 165.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

The opinion below is reported in 192 Fed., 548:

FACTS.

No serious question can be made that the facts of the perjury were proved beyond doubt. The petitioning creditor never really had any business transactions with the bankrupt, but allowed the use of his name at the bankrupt's request (pp. 24, 25, 36). Also the same man was used as ostensible purchaser of certain pianos, immediately before the filing of the petition, evidently in an effort to get them beyond the reach of the creditors (p. 51), in support of which effort the bankrupt attempted to maintain the *bona fides* of the sale, and attempted also to conceal the

whereabouts of the alleged purchaser (pp. 32, 29, 30, 31, 20–21).

The perjuries were subsidiary to this general plan.

THE QUESTIONS.

Three principal points are made as grounds for reversal:

(1) That in proving the perjury (under both indictments) there was error in not limiting the proof of the bankrupt's testimony to the actual false statements charged as perjury.

(2) That the falsity of the statements was not adequately proved.

(3) That the false statements before the special examiner (the first indictment) were not perjury, because, as is claimed, there is no authority to take evidence prior to the adjudication, even for the purpose of locating and conserving the property incident to the receivership.

FIRST POINT.

SECTION 860, R. S., WAS REPEALED BEFORE THE TRIAL AND DOES NOT APPLY; BUT NEITHER IT NOR SECTION 7 A-9 OF THE BANKRUPTCY ACT GAVE ANY PRIVILEGE AGAINST THE USE OF THE FACT OF SELF-CONTRADICTION AS PART OF THE PROOF OF PERJURY.

In principle, we think this question is covered by the reasoning of *Glickstein* v. *U. S.* 222 U. S., 139, but the actual decision of that case was only that the testimony assigned as the *corpus* of the perjury may be used, and it did not raise the precise point asserted here, which is:

That neither self-contradiction, nor intent, nor materiality, nor, in short, anything but the mere saying of the falsehood may be shown by using the perjurer's testimony.

I. The facts raising the question.

There is considerable doubt whether the point is raised by the facts. The court below thought not, holding the testimony offered to have been merely a part of the *corpus* of the perjury; and it is fair to say that a reading of the testimony itself *in extenso* (pp. 13–20) confirms their construction as substantially correct.

Still, by a microscopic study, the appellate counsel has discovered four shreds of testimony which, when isolated, do seem to raise his point; and we are not disposed to scrutinize the matter too strictly, because the question is most important to the due protection of the witness stand and ought to be settled.

II. The statutes and the repeal of section 860, R. S.

A second preliminary matter requires to be noted before we proceed to the argument on the merits.

Section 860, R. S., provides as follows:

> SEC. 860. (Pleadings, disclosures, etc., not to be used in criminal proceedings.) No pleading of a party, nor any discovery of evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the

> enforcement of any penalty or forfeiture: *Provided, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.*

Section 7, a–9, of the bankruptcy act provides as follows:

> When present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; *but no testimony given by him shall be offered in evidence against him in any criminal proceeding.*

Both these statutes were relied on at the trial (p. 14) and in counsel's brief here, but counsel has chosen to plant himself mainly on section 860, touching the other very lightly (brief, p. 36). The difference is that section 860 contains a proviso upon the form of which counsel bases an argument, but which is not in the bankruptcy act.

The two acts were assimilated by the *Glickstein* case, and we do not consider the difference really important, but if it be important, the case must rest exclusively on the bankruptcy act, because of the repeal of section 860.

The repealing act (enacted May 7, 1910, 36 Stat. 352) read simply as follows:

> *Be it enacted*, That section eight hundred and sixty of the Revised Statutes of the United States be, and the same is hereby, repealed.

The effect of this repeal is sought to be avoided for the reason that, though the testimony was *used* after the repeal (the trial being on November 10, 1910, p. 18), it *originated* before (i. e., October 28, 1909, p. 8), and it is urged that the repeal intended to save the operation of the act as to such testimony.

There was no express saving clause, and counsel, of course, concedes the general rule that, in the absence of the clause, changes in matters of procedure ordinarily apply instantly and as well to pending as to future cases.

Hopt v. *Utah*, 110 U. S. 574:

> Repeal of act incapacitating felons from testifying.

Ewell v. *Daggs*, 108 U. S. 143, 150:

> Repeal of statute giving defense cf. usury.

Kans. P. R. Co. v. *Twombly*, 100 U. S. 78, 81:

> Repeal (pending writ of error) of statute creating right.

Balt., &c., R. Co. v. *Grant*, 98 U. S. 398:

> Repeal of jurisdiction.

Wilkinson v. *Nebraska*, 123 U. S. 286:

> Same.

McNulty v. *Batty*, 10 How. 72:

Same.

South Carolina v. *Gaillard*, 101 U. S. 433:

Repeal of act giving remedy.

Cf. *Legal Tender cases*, 12 Wall. 457:

Legal-tender laws apply to prior debts.

The form of section 860 and of the repealing act make it peculiarly impossible to imply a saving clause here without violence to the language chosen by the Legislature. The original section was a prohibition against any "use." It was addressed to the time of the later profferred "use" and not to the time the testimony was given in the first instance. Its operation (so long as it was effective) was solely to prevent the "use," and the instant it was wiped out no obstruction remained against the "use."

Counsel, however, argue that a saving clause must be implied, on a supposition that Congress could not have intended "so flagrant a breach of faith" and so "immoral" and "unjust" a result.

It suffices to refer to the report made on the repealing bill by the Senate committee (incorporating the similar report of the House committee), which shows conclusively that the very reason for the repeal was the absence of any such contractual obligation, because, as a result of *Counselman* v. *Hitchcock*, 142 U. S. 547, the immunity granted by the section had become a mere gratuity and a stumbling block to justice. The report is printed in full as an appendix, and it puts this proposition beyond controversy.

Re Hall, 167 U. S. 38, involved a somewhat similar destruction of a gratuity due to failure of consideration, and the court said:

> The effect of the passage of the repealing act was to take away the jurisdiction of the Court of Claims to proceed further in those cases which were founded upon the act thus repealed. This the Congress had power to do. *Merchants' Insurance Co.* v. *Ritchie*, 5 Wall. 541, 544; *Ex parte McCardle*, 7 Wall. 506; *Ex parte Yerger*, 8 Wall. 85; *Baltimore & Potomac Railroad* v. *Grant*, 98 U. S. 398; *Gurnee* v. *Patrick County*, 137 U. S. 141.
>
> This court had just decided that the act of February 13, 1895, 28 Stat. 644 [the repealed statute], simply conferred a gratuity upon the persons covered by its provisions; that there was no element of a legal or an equitable claim in their favor against the municipal authorities of the District, but that the act provided for a gift which was wholly without consideration. The repeal of the act took away all jurisdiction in the Court of Claims to proceed further, so far as concerned any rights founded upon the act so repealed * * * (pp. 42–43).

There can be no question that Congress deliberately omitted the saving clause and intended to wipe out section 860 immediately and entirely.

III. There is no such immunity.

The question then is:

> In the prosecution of a bankrupt for perjury in the bankruptcy proceedings may the Gov-

> ernment use his testimony in those proceedings to prove other points of the charge than the mere text of the false statement itself?

This exact question has not been decided here, but it was decided, in favor of our position, in—

> *Daniels* v. *U. S.*, 196 Fed. 459 (C. C. A. 6th C).
> *U. S.* v. *Brod*, 176 Fed. 165 (C. C. Ga., Newman, D. J.), *semble*.
> Cf. *People* v. *Cahill*, 126 App. Div. (N. Y.) 391.

Both of these opinions are well reasoned, as is also the opinion in *U. S.* v. *Smith*, 47 Fed. 501, which arose, not in bankruptcy, but under section 860, R. S., before its repeal.

Glickstein v. *U. S.*, 222 U. S. 139, *supra*, though not deciding the exact point, is nevertheless based on reasoning which concludes this case, and it was so regarded by the Court of Appeals for the Sixth Circuit in the *Daniels* case, *supra*. The nub of the opinion is in the following passages:

> It can not be conceived that there is power to compel the giving of testimony where no right exists to require that the testimony shall be given under such circumstances and safeguards as to compel it to be truthful. In other words, this is but to say that an authority which can only extend to the licensing of perjury is not a power to compel the giving of testimony, Of course, these propositions being true, it is also true that the immunity afforded by the constitutional guaranty *relates to the past* and does not endow the person who testifies with a license to commit perjury * * * (p. 142).

> The statute expressly commands the giving of testimony, and its manifest purpose is to secure truthful testimony, while the limited and exclusive meaning which the contention attributes to the immunity clause would cause the section to be a mere license to commit perjury, and hence not to command the giving of testimony in the true sense of the word (p. 143).

The court approved *Edelstein* v. *U. S.*, 149 Fed. 636, 641–644 (C. C. A. 8th C., Judge, now Mr. Justice, Van Devanter concurring), which also seems in its reasoning to cover this present case, and in which it was said:

> It would seem that the statute in question was not intended to confer a broader immunity, so far as it was applicable, than the constitutional provision does in its scope of operation. To hold that the statute protects a bankrupt from the use of his evidence in a prosecution for perjury while actually testifying would defeat the obvious purposes of the act. * * * Moreover, it would, in effect, secure to the bankrupt the immunity in question for violating his part of the compact, namely, to testify—that is, to testify truthfully—by virtue of which he secured a right to the immunity. We are not willing to impute to Congress any such contradictory and absurd purpose. The words "any criminal proceeding" can not sensibly or reasonably be construed so literally and generally as to include the criminal proceeding provided by law for false swearing in giving his testimony. They

obviously have reference to such criminal proceedings as arise out of past transactions, about which the bankrupt is called to testify (pp. 643–644).

The opinions in these cases cover the question so thoroughly and so compactly that we will not elaborate the argument, except to bring it into relation with the particular points made by counsel.

Much of his argument is based upon the peculiar phraseology special to section 860 and not repeated in the bankruptcy act. It therefore does not bear on this case. The proposition is that the proviso of 860 expressly deals with the subject of perjury prosecution, but instead of excepting that kind of prosecution from those in which the use of the testimony is prohibited it merely reserves the right to prosecute. The argument, however, proves too much, for it would equally prevent the use even of the testimony which is concededly usable under the *Glickstein* case.

But, anyway, as stated, the argument is founded upon the peculiar language of section 860 and is inapplicable.

The second argument advanced is that Congress can not have intended to permit the "*general use*," so called, of the testimony (even in prosecution for perjury in the same proceeding), because, it is argued, that would nullify the purpose of the statute by throwing the door open "to every witness on every trial to refuse his testimony through a valid assertion

of his claim [of privilege] against incrimination," i. e., because "a *truthful* answer to the question may show that his *prior* testimony was erroneous." (Brief, p. 9.)

Here, again, the argument proves too much, for it also hits even the conceded extent to which the testimony may be used. If *true* statements by a witness are privileged as tending to incriminate him (as argued, brief, p. 9), the proof of the *false* statements must be even more directly a violation of that privilege.

But of course there never was any constitutional privilege open to a witness against being compelled to contradict himself. When was any witness ever so bold as to claim, when driven into a corner on cross-examination, that he was privileged against further testifying because he would have to reveal a perjury committed on the direct? (Cf. *Powers* v. *U. S.*, 223 U. S. 303, 316.)

This is the essential difficulty with petitioner's whole case—it disregards in particular the character and purpose of cross-examination, and in general the difference between self-incrimination and crimes by witnesses on the witness stand.

And this, if we understand it, is the purport of the *Glickstein* case. The immunity was intended to be given in relation to "past" offenses (those to which the privilege against self-incrimination relates) [1] and

[1] See *U. S.* v. *Swift*, 186 Fed. 1002, which held that the immunity against prosecution under the antitrust act did not extend to *future* crimes.

not to misconduct on the stand itself. In other words, it was not intended to modify the duty of a witness or the usual course of prosecution for breach of that duty. To so construe it would be to assume that while granting indulgence for the sake of getting testimony, Congress intended to withdraw the usual safeguards which make testimony truthful and of value; in other words, as the court said, to grant "a license to perjury."

But, at this point, it is argued, finally, that the *necessity* of saving the power to prosecute for perjury is satisfied by implying a right to use the testimony charged as false, and does not extend to a "general use" of the correlated testimony to show intent, the truth, materiality, absence of mistake, and such other incidents to proof of perjury.

There is no basis in the statute for such a distinction. Its purpose, as we have said, is to deal with crimes as to which a constitutional privilege could have existed or could have been asserted (cf. *Heike* v. *U. S.*, 217 U. S. 423) and not to deal at all with violations of the duties assumed by the witness when taking the stand. There is nothing whatever in the statute that justifies a limitation upon the conventional (and constitutional) methods of proving perjury, which have always included proof of self-contradictions on the witness stand.

U. S. v. *Wood*, 14 Pet. 430, 440.
State v. *Broughton*, 7 ~~Ired.~~ Ired. 96.

Nor would the petitioner's case be much advanced if his proposition were correct and the statute were

regarded as excepting only such proof as is "necessary" to establish perjury, rather than as excepting the business of prosecuting for perjury. To be sure, there is no other way of showing that a defendant spoke falsely than by showing that he spoke falsely; but there is, practically at least, no other way of showing that he *intended* inside his mind to speak falsely than by showing that he reiterated it and stuck to it under pressure, or of showing the *materiality* of the perjury than by showing the course of the testimony and the pleadings (which, on petitioner's argument, would be equally privileged for this "general purpose"); and the historic and usual and most practicable and, nine times out of ten, the *necessary* way of providing the *quantum* of proof requisite to show the falsehood, is by proof of inconsistencies and contradictions in the testimony itself.

Among these various degrees of "necessity" there is no one more likely than another to have been over the line if Congress had intended to draw one, and there is no reason apparent for implying the line at one place rather than another.

The simple fact is that Congress never intended to affect the existing law about prosecutions for perjury at all.

All this testimony, whether before Commissioner Alexander, as special master, or before the referee, was in the same proceeding, if that makes any difference. (*Powers* v. *U. S.*, 223 U. S. 303.)

SECOND POINT.

THE EVIDENCE SUPPORTED THE VERDICT.

It was argued (pp. 37–39) that there was not sufficient evidence to support the findings of perjury as to the sale of the pianos, the conversation with respect thereto, and the address of Smith.

No such claim was made on the trial, the motions to take from the jury being only for an alleged variance and for alleged failure of proof of materiality (pp. 38, 39).

There is no exception to raise the point.

But Smith's testimony (pp. 21–25, 36) that the whole thing was fictitious was amply corroborated, among other things, by Rochemont's testimony as to the efforts of the defendant to conceal the whereabouts of Smith from the trustee (pp. 29–32) and the testimony of Govers to the same effect (p. 31).

THIRD POINT.

THE EXAMINATION BY THE COMMISSIONER AS SPECIAL EXAMINER WAS DULY AUTHORIZED, AND THE FALSE TESTIMONY THERE WAS PERJURY.

If either of the two preceding points involves reversible error, the judgment must fall, irrespective of what may be thought on this point, because they cover both of the two consolidated indictments, unless, as is possible, the basis of fact on the immunity point is deemed insufficient to raise the question under the indictment for perjury before the special examiner. It certainly is rather more flimsy than under the other indictment.

On the other hand, if our position upon these two points is sound, the judgment must be affirmed, likewise irrespective of what may be thought on this point, because this concerns only the indictment for perjury before the special examiner (the first one) and leaves unaffected the indictment for perjury before the referee (the second one), and that alone is sufficient to support the judgment.

Claassen v. *U. S.*, 142 U. S. 140.
Evans v. *U. S.*, 153 U. S. 584 and 608.
Goode v. *U. S.*, 159 U. S. 663.
Powers v. *U. S.*, 223 U. S. 303, *supra*.

Nevertheless, we hope it may be decided, because there are conflicting decisions in the Courts of Appeal, and the question is extremely important.

I. The facts.

The examination criticized was held after petition filed, and after the appointment of the receiver, and for the purpose of preventing the concealment of assets from him and to aid him in locating the assets.

II. The question.

The claim is that the order appointing the special examiner was beyond the power of the court because it was made prior to the adjudication.

III. The prior decisions.

The decision of the Court of Appeals below is supported by the undisputed rulings under the acts of

1841 and 1867[1] and by the uniform practice under the present act until the contrary decision rendered in 1909, by the Court of Appeals for the Third Circuit, in *Skubinsky* v. *Bodek*, 172 Fed. 332.

The authorities expressly supporting our position are—

Ex parte Lee, 15 Fed. Cas. 8, 178 (D. C. N. Y. 1842).

Bankrupt ordered to submit to examination before adjudication under act of 1841 (5 Stat. 440).

In re Salkey, 21 Fed. Cas. 12, 252 (C. C. Ill. 1873).

Same, under act of 1867 (14 Stat. 518).

In re Fixen, 96 Fed. 749 (D. C. Cal. 1899).

Same, under act of 1898.

In re Fleischer, 151 Fed. 81 (D. C. N. Y. 1907).

Same.

Ex parte Bick, 155 Fed. 908 (C. C. N. Y. 1907).

Writ of *habeas corpus* on behalf of a bankrupt who had given evasive answers upon examination before adjudication dismissed.

U. S. v. *Wechsler*, 16 Am. B. R. 1 (D. C. N. Y. 1905).

Jury charged that perjury might be committed during an examination before adjudication. Conviction affirmed, 158 Fed. 579 (C. C. A. 2d Circ.).

U. S. v. *Liberman*, 176 Fed. 161 (C. C. N. Y. 1910).

[1]But these acts did not contain the particular language relied on under the present act.

Indictment for perjury, alleged to have been committed by a creditor at an examination before adjudication, sustained.

See dissenting opinion of Judge Buffington in *Skubinsky* v. *Bodek*, 172 Fed. 332, *supra*.

23 Harvard Law Rev. p. 221.

10 Columbia Law Rev. 70.

Loveland on Bankruptcy (3d ed.), section 204.

Of the cases holding to the contrary *In re Thompson*, 179 Fed. 874 (D. C. Pa., 1910), and *Podolin* v. *McGettigan*, 193 Fed. 1021 (C. C. A., 3d Circ.), were both expressly grounded upon the decision in *Skubinsky* v. *Bodek*, 172 Fed. 332, a prior authority in the same circuit, while in *In re Crenshaw*, 155 Fed. 271 (D. C. Ala., 1907), and *In re Davidson*, 158 Fed. 678 (D. C. Mass., 1907), no receiver had been appointed, and the latter decision was put upon this specific ground, and thus distinguished from *In re Fleischer*, 151 Fed. 81 (D. C. N. Y., 1907). Thus the only decisions to the effect that the court can not examine witnesses at any time after the filing of the petition *and the appointment of a receiver* are the *Skubinsky* case and later decisions in the same circuit. Collier (9th ed., pp. 452–3) is in doubt but concludes against us, and Remington is against us (1 Bank., sec. 1543), though he recognizes the right to examine by means of "provisional remedies," as the establishment of a receivership or an application for an injunction.

IV. Even under section 21a of the bankruptcy act the examination was authorized, because the estate was in process of "administration" within the meaning of the section as soon as it came into the jurisdiction of the court by the filing of the petition, and certainly as soon as the receiver was appointed.

The text of the section is as follows:

> A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act. (32 Stat., 798.)

The words "whose estate is in process of administration under this act" are merely descriptive. There is nothing to show that they are intended as a limiting proviso equivalent to "provided that the order of adjudication has been made." Some such proviso would have been the normal way to express such a limitation, or the section would have begun with the words "As soon as an adjudication has been made, a court may," etc.; or if the present structure had been preserved, it would have said "a bankrupt," not "*whose* estate is in process of administration under this act," but "*if* his estate is in process," etc. This would be the natural method, considering that a "bankrupt" is such as soon as the petition has been filed. The sense of the passage is really equivalent to "a bankrupt *whose bankruptcy it is*."

In our view the "administration" by the court within the meaning of the word as used here attaches immediately upon the filing of the petition, and does not await the appointment of a receiver, and this is the weight of authority; but if there be a distinction as was thought in *Re Davidson*, *supra*, this case, of course, falls the other side and does not concern it.

The argument is thoroughly expounded in the opinion of Judge Hough in *re Fleischer*, 151 Fed. 81, *supra*, approved by the court below; and in the dissenting opinion of Judge Buffington in the *Skubinsky* case, 172 Fed. 332, *supra*.

Summarily it is as follows, as put by Judge Hough:

> To administer is "to control or regulate in behalf of others" (Cent. Dict.), and this is exactly what a receiver in bankruptcy does, and must do, with the property of one against whom a petition has been filed. It is the very object of his appointment to control and regulate, on behalf of the creditors of the alleged bankrupt, the property concerning which the investigation is to take place. (*In re Fleischer*, 151 Fed. 81.)

Judge Buffington, Jr.

> The word "administer" means literally to minister to, to serve, and surely preliminary preservation, getting trace of assets, preventing concealed goods from being spirited away; in other words, preventing the scattering and dissipating of property, so that there may be an estate to sell and distribute, is the very gist of administration. * * * We may rightfully use, of the administration of a bankrupt

court, *mutatis mutandis*, the language of the Supreme Court of Alabama in *Martin* v. *Ellerbe's Adm'r*, 70 Ala. 326, and say: "The term 'administration' includes more than the collection of assets and the payment of debts and legacies and distribution to the next of kin, and involves anything that may be done rightfully in the preservation of the assets of the estate, and which may be done legally by the administrator in his dealings with creditors, distributees, or legatees, or which may be done by them in securing their rights." * * *

The word "administration" is used in the bankruptcy act as descriptive of the entire proceedings dating from the time of the filing of the petition and the appointment of a receiver and not in the narrow technical sense as referring only to that part of the proceedings which commence after adjudication. In other words, the administration which proceeds from adjudication is simply the continuation of that which preceded adjudication. This is most clearly implied in section 22 (*a*), which provides: "After a person has been adjudged a bankrupt, the judge may cause the trustee to proceed with the administration of the estate or may refer it." Proceeding with an administration implies that administration has already begun. Moreover, since by section 64 (*b*), the first item paid out of a bankrupt's estate is "the actual and necessary cost of preserving the estate subsequent to filing the petition," it is hard to say that the court, which was

preserving and keeping intact the property prior to the appointment of a trustee, was not administering. * * *

The act clearly makes no provision that the court's jurisdiction shall be divided into two periods, viz, a nonadministrative period prior to adjudication and an administrative one after adjudication. On the contrary, the whole tenor of the act is to regard the time from the filing of the petition to the close of the proceeding as an administrative whole. Thus section 1 (4) provides that the word "bankrupt" shall "include a person against whom an involuntary petition has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt"; clause 10, that the word "bankruptcy" "with reference to time, shall mean the date when the petition was filed." (Buffington, J., 172 Fed. 338.)

V. Independently of section 21 (a), an examination of a bankrupt prior to adjudication is within the general equity powers of a bankruptcy court conferred by section 2 (15), and the concluding paragraph of the section.

Courts of bankruptcy are by section 2 "invested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings."

It has been held that the words "at law" in this provision were probably inserted to meet clause (4) of section 2, bankruptcy proceedings being in the nature of proceedings in equity. (*Bardes* v. *Hawarden*, 178 U. S. 524, 535.)

And the current of judicial opinion is apparently uniform to the effect that a court of bankruptcy sits also as a court of equity, "seeking to administer the law according to its spirit, and not merely by its letter."

In re Kane, 127 Fed. 552 (C. C. A., 7th Circ., 1904).

In re Union Trust Co., 122 Fed. 937, 940 (C. C. A., 1st Circ., 1903).

In re Levi & Klauber, 142 Fed. 962 (C. C. A., 2d Circ., 1905).

Matter of Brenner, 26 Am. B. R. 646 (D. C., Pa., 1911).

Ex parte Lee, 15 Fed. Cas. 8, 178 (D. C., N. Y., 1842).

Section 2 (15) provides that courts of bankruptcy are invested with jurisdiction to "make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act."

And it is laid down in the concluding paragraph of the section that "nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

That the combined effect of these three provisions is to allow bankruptcy courts extensive equity powers not elsewhere conferred by the act is the doctrine declared by the following cases:

In re Lacov, 142 Fed. 960 (C. C. A., 2d Circ., 1905).

Expenses of receivership put upon petitioning creditors where proceedings were dismissed and no adjudication ever took place.

In re Levi and Klauber, 142 Fed. 962 (C. C. A. 2d Circ. 1905).

Involuntary petition dismissed for want of prosecution by creditors on the analogy of an ordinary abandoned bill in equity against a debtor.

In re Union Trust Co., 122 Fed. 937 (C. C. A. 1st Circ. 1903).

Sale of bankrupt's property free from incumbrances ordered, although the equity was of a doubtful nature.

Blake v. *Francis-Valentine Co.*, 89 Fed. 691 (D. C. Cal. 1898).

Debtor enjoined from selling his property within four months after bankruptcy act of 1898 went into effect, even though no petition had been filed against him.

In re Cohen, 136 Fed. 999 (D. C. Ill. 1905).

Writ of *ne exeat regno* issued against a bankrupt, though application did not conform to the requirements of section 9 (*b*). To the same effect are *In re Lipke*, 98 Fed. 970 (D. C. N. Y. 1900), and *In re Berkowitz*, 173 Fed. 1012 (D. C. N. J. 1908).

White v. *Schloerb*, 178 U. S. 542 (1899).

Persons who had replevied, under process of a State court, property of a bankrupt in the custody of a bankruptcy court compelled to restore that property to its custody.

In the case of *In re Cohen*, *supra*, Judge Humphrey, in construing the powers granted by section 2, said (p. 1000):

> Section 2 defines the powers of a court of bankruptcy. In 19 subdivisions it enumerates in detail the necessary judicial powers which the legislative power could anticipate, and although the court is thus specifically clothed with these numerous powers, subdivision 15 is inserted in the following words [quoting the subdivision]. Here is a sweeping general delegation of power, evidently intended to supply any omission occurring in the various other subdivisions of the section as far as Congress could legally do so. It is clear that Congress intended by this language to give the court every necessary power. It could not give the power to legislate, or to extend the provisions of the act. No power can be exercised which does not clearly reside in the act. But Congress intended to give, and, in my judgment, the above-quoted language does give, every judicial power known to the law which the court may find necessary for the proper enforcement of the bankrupt act.

It follows therefore that where an examination of the bankrupt is "necessary for the proper enforcement of the bankrupt act," the court has ample authority to order it at any stage of the proceedings.

In re Fleischer, 151 Fed. 81 (D. C. N. Y. 1907).

In re Fixen, 96 Fed. 749 (D. C. Cal. 1899).

VI. This construction being therefore possible, both under section 21 (a) and under the general equity power, it should be accepted, because the other view leads to the result that *no* witnesses may be examined before adjudication, thus bringing to a standstill the powers of the bankruptcy courts and their representatives during the 20-day interval between the filing of the petition and the adjudication.

It must be noted that section 21(*a*) applies not only to the bankrupt, but to *all* witnesses, and if it prohibits examination of the bankrupt, as claimed, it must also prohibit examination of every other witness.

The result of such a blinding of the court for all the time intervening between the institution of the proceedings and the adjudication tends, of course, to permit a fraudulent bankrupt to have his goods out of sight by the time the court is permitted to open its eyes.

The present case illustrates the situation as well as any. Here is a bankrupt concealing his property and even the address of the petitioning creditor, a receiver appointed by the court to take "possession of all property," etc. (p. 44), and "to do all and any such acts and take all and any such proceedings as may enable him forthwith to obtain possession of all and any such property" (p. 45); and a correlative command of the court to everybody "to turn over all such property to him" (p. 45), with the other usual requirements, and yet it is said the court has no power to examine *any witness whatever* as a means either of searching out the property or of preserving it.

For example, the rule that a receiver will be appointed only when absolutely necessary to preserve the estate (section 2 (3); Col. on Bank. (9th ed.) 36) requires that the bankrupt, as well as other witnesses, should at all times be available for examination in order that such necessity may be shown to exist. If an examination can not be held until after adjudication, it will be exceedingly difficult to obtain the appointment of a receiver, which is the only means open to creditors to prevent a dissipation of the bankrupt's estate.

And the practical necessity for immediate investigation in order to preserve the estate is most forcibly put by Judge Hough in *Re Fleischer*, as follows:

> The desirability and importance of promptly conducting an investigation into the affairs of any person petitioned into the bankruptcy court has been too often shown to be open to doubt. To wait until adjudication to ascertain from the bankrupt's own lips the situs of his property and his own explanations of the situation in which the creditors find themselves is in many cases giving to those guilty of fraud just the necessary time to permit the fraud to be consummated and the fruits thereof secured. In my opinion it is not too much to say that a skillful and vigorous use of early examinations of involuntary bankrupts is the one thing which enables creditors to prevent this statute being easily turned into a shield for dishonesty and a potent aid to fraud. (151 Fed., 81, p. 83.)

To the same effect are the remarks of Judge Chatfield in *U. S.* v. *Liberman*, 176 Fed., 161, at pp. 163, 164:

> The very purpose of an examination under section 21(a) is to discover the property of the bankrupt, or to learn as to its whereabouts and as to the acts of the bankrupt with respect thereto; and if the bankrupt could delay such investigation either by interposing an answer and thus preventing adjudication, or by delaying the filing of schedules and the calling of a first meeting, the property in many cases, at least in those in which fraud might be present, would be lost and beyond the reach of process or even discovery, and in such cases the services of a receiver would be substantially useless, for no knowledge would ordinarily be obtained until time for the election of a trustee, when what knowledge might be acquired would undoubtedly be too late to be of any service.

The dismay with which the doctrine of the *Skubinsky* case has been received in actual bankruptcy practice is illustrated also by the following extract from a referee's certificate presented to the court in *Craddock-Terry Co.* v. *Kaufman*, 175 Fed. 303 (D. C. Tex. 1909):

> Counsel for Mrs. K. (the bankrupt) objected to such examination upon the theory that, under section 21(*a*) of the bankruptcy act, prior to adjudication, an alleged bankrupt may not be required to submit to an examination, citing in support of their contention *In re*

Davidson and *Skubinsky* v. *Bodek*. To follow these decisions and the rules therein stated would defeat the majority of applications for receivers in involuntary cases, but I have been unable to find any authority to the contrary.

CONCLUSION.

The judgment should be affirmed.

WINFRED T. DENISON,
Assistant Attorney General.

FRANCIS H. MCADOO,
Attorney.

OCTOBER, 1913.

APPENDIX—REPORT ON REPEAL OF SECTION 860 R. S.

[Senate Report No. 502 (61st Cong., 2d sess.) on H. R. 16367.]

REPEALING SECTION 860 OF THE REVISED STATUTES.

APRIL 5, 1910.—Ordered to be printed.

Mr. CLARK, of Wyoming, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany H. R. 16367.]

The Committee on the Judiciary, to whom was referred the bill (H. R. 16367) to repeal section 860 of the Revised Statutes, beg leave to report the same back with the recommendation that the bill do pass.

The report of the Judiciary Committee of the House of Representatives, which is hereby concurred in, is as follows:

The Committee on the Judiciary, to whom was referred the bill (H. R. 16367) to repeal section 860 of the Revised Statutes, beg leave to report the bill back with the recommendation that the bill do pass.

Section 860, which the bill proposes to repeal, reads as follows:

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence, or in any manner used

against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided*, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

This section was enacted apparently for the purpose of enabling the Government to compel the disclosure of incriminating testimony on condition that the witness disclosing the same would be given immunity. In the case of Counselman *v.* Hitchcock (142 U. S., 547) it was held that legislation can not abridge a constitutional privilege, and that it can not replace or supply one, at least unless it is so broad as to have the same extent in scope and effect, and that said section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition, and that in view of the constitutional provision (article 5 of the amendments) a statutory enactment to be valid must afford absolute immunity against future prosecution for the offense to which the question relates.

Since the decision above referred to section 860 has possessed no usefulness whatever, but has remained in the law as an impediment to the course of justice. Under it a witness can not be compelled to give any incriminating testimony whatever, but if he chooses to go on the witness stand and testify as to any matter whatever, even of his own volition, and, whether incriminatory or not, his testimony can not thereafter be brought up against him in any criminal proceedings. He can not be confronted with his own testimony or his own previous statement under oath even on cross-examination. The statute has become a shield to the criminal and an obstruction to justice.

The bill has the approval of the Attorney General, as will appear by a quotation from pages 22 and 23

of his annual report for the year 1909, which reads as follows:

"In the enactment of this section it was the apparent intention of Congress to create a law which would enable prosecutors to give immunity to witnesses who were compelled to testify against themselves, but the Supreme Court, in the case of Counselman *v.* Hitchcock (142 U. S., 547), held that this section was no substitute for the constitutional guaranty against self-crimination. As a result it is availed of constantly by criminals to prevent the Government from using against them any testimony given by them at any time in any proceeding. So far as I am aware no statute in any of the States protects a man who is charged with a crime from having used against him in a criminal proceeding testimony given by him in a civil suit. The United States attorney for the Southern District of New York informs me that it is an everyday occurrence in bankruptcy cases for bankrupts and their witnesses to testify before special examiners, referees, etc., often falsely, and then, when indicted for some offense under the bankruptcy act, to appear in court and testify in direct contradiction of what they may have deposed in the proceedings before the referee or examiner; but the Government is prevented by the above-quoted section from using such testimony against them."

The repeal proposed in no way deprives, nor could it deprive, the witness of the benefit of any constitutional privilege; other statutes passed and now in force furnish all necessary and proper protection and immunity.

In the interstate-commerce act of February 4, 1887, authority is given to the Interstate Commerce Commission to compel the attendance of witnesses and the production of evidence, and provides further:

The claim that any such testimony or evidence may tend to criminate the person giving such evidence

shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding. (24 Stat., 383.)

The above clause was reenacted in 1889 (25 Stat., 859) and again reenacted in 1891. (26 Stat., 744.)

Preceding the foregoing provision in the interstate-commerce act is a provision that any circuit court may issue a subpœna for a witness refusing to testify before the commission and require him to testify. Failure to obey may be punished as for contempt.

In the act of February 11, 1893, entitled "An act in relation to testimony before the Interstate Commerce Commission," etc., it is provided as follows:

But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. (27 Stat., 444.)

Under the act of February 19, 1903, entitled "An act to further regulate commerce with foreign nations and among the States," after providing for the compulsory attendance of witnesses it is provided:

The claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying, or such corporation producing its books and papers; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, in such proceeding. (32 Stat., 848.)

The legislative, executive, and judicial appropriation act approved February 25, 1903, under the heading "Department of Justice," after appropriating $500,000 for expenses of proceedings instituted under the interstate-commerce act and the Sherman antitrust act, continues:

Provided, That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts: *Provided further*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying. (32 Stat., 904.)

In the act to establish the Department of Commerce and Labor, approved February 14, 1903, after giving the Commissioner of Corporations the power to make investigations of corporations, as to the management of their business, etc., it is (in sec. 6) further provided:

All the requirements, obligations, liabilities, and immunities imposed or conferred by said "act to regulate commerce," and by "An act in relation to testimony before the Interstate Commerce Commission," etc., approved February 11, 1893, supplemental to said "act to regulate commerce," shall also apply to all persons who may be subpœnaed to testify as witnesses or to procure documentary evidence in pursuance of the authority conferred by this section. (32 Stat., 828.)

In the "act defining the right of immunity of witnesses," etc., approved June 30, 1906, the immunity provided in certain acts therein mentioned was restricted to "a natural person who, in obedience

to a subpœna, gives testimony under oath," said act being in the following terms:

AN ACT Defining the right of immunity of witnesses under the act entitled "An act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, and an act entitled "An act to establish the Department of Commerce and Labor," approved February fourteenth, nineteen hundred and three, and an act entitled "An act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and an act entitled "An act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," approved February twenty-fifth, nineteen hundred and three.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That under the immunity provisions in the act entitled "An act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, in section six of the act entitled "An act to establish the Department of Commerce and Labor," approved February fourteenth, nineteen hundred and three, and in the act entitled "An act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and in the act entitled "An act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," approved February twenty-fifth, nineteen hundred and three, immunity shall extend only to a natural person who, in obedience to a subpœna, gives testimony under oath or produces evidence, documentary or otherwise, under oath.

Approved, June 30, 1906.

In a letter to the chairman of the Senate Committee on the Judiciary with regard to the repeal of section 860 of the Revised Statutes the Attorney General says:

I think that section 860 of the Revised Statutes should be repealed. It is there provided that no

pleading of a party nor any discovery of evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence or in any manner used against him or his property or estate in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture, provided that that section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying, as aforesaid.

In the enactment of this section, it was the apparent intention of Congress to create a law which would enable prosecutors to give immunity to witnesses who were compelled to testify against themselves, but the Supreme Court, in the case of Counselman *v.* Hitchcock (142 U. S., 547), held that this section was no substitute for the constitutional guaranty against self-incrimination and, therefore, that one could not be compelled to testify as to a matter that might incriminate himself, yet if he should see proper to do so, the testimony could not be used against him. The criminal, therefore, gets all the benefit of the act while the Government gets none; and the section is so comprehensive in its terms that it is availed of constantly by criminals to prevent the Government from using against them any testimony given by them at any time in any proceeding.

The United States attorney for the southern district of New York informs me that it is an everyday occurrence in bankruptcy cases for bankrupts and their witnesses to testify before special examiners, referees, etc., often falsely, and then, when indicted for some offense under the bankruptcy act, to appear in court and testify in direct contradiction of what they may have deposed in the proceeding before the referee or examiner, but the Government is prevented by the above-quoted section from using such testimony against them. Again, in cases where the defendant is arrested and testifies on a preliminary hearing before a United States commissioner giving there a version of the transaction, he may, when

brought to trial upon an indictment, take the stand in his own defense and tell an entirely different and conflicting story from that told by him before the commissioner, but the Government is prevented by section 860 from using any prosecution or previous conflicting statement made by him before the commissioner. I regard it, therefore, as a matter of vital importance to the Government that both of these modifications be made in the existing law.

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